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IN THE

Supreme Court of the United States

October Term, 1961.

No. 343.

PETER T. DANA, et al.,

Petitioners,

v.

WILLIAM GOLDMAN THEATRES, INC., et al.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF IN OPPOSITION FOR WILLIAM GOLDMAN THEATRES, INC. and PENNSYLVANIA ASSOCIATION OF AMUSEMENT INDUSTRIES.

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Petitioners,

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WILLIAM GOLDMAN THEATRES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF IN OPPOSITION FOR WILLIAM GOLDMAN THEATRES, INC. and PENNSYLVANIA ASSOCIATION OF AMUSEMENT INDUSTRIES.

OPINIONS BELOW.

The opinions of the Supreme Court of Pennsylvania (Pet. App.[1] 31-89) are reported at 405 Pa. 83, 173 A. 2d 59 (1961). The opinion of the Court of Common Pleas of Dauphin County (R. 27a-94a) is reported at 75 Dauphin County Reports 300 (Pa. 1960).

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1. "Pet. App." refers to the appendix to the petition for writ of certiorari; "R". refers to the Record filed in the Supreme Court of Pennsylvania by petitioner in **William Goldman Theatres, Inc., and Pennsylvania Association of Amusement Industries by William Goldman Theatres, Inc., Trustee Ad Litem v. Peter T. Dana, Mae M. Bergin and Ira C. Sassaman, Individually and as members of Pennsylvania State Board of Motion Picture Control** (No. 22, May Term, 1961).

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on July 26, 1961.

The petition for writ of certiorari was filed on August 22, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTION PRESENTED.

Whether this Court has jurisdiction to review a decision of the Supreme Court of Pennsylvania which rests upon an independent and adequate non-federal ground.

CONSTITUTIONAL PROVISIONS INVOLVED.

In addition to the Fourteenth Amendment the following provisions of the Constitution of the Commonwealth of Pennsylvania are involved:

Article I, Section 6:

Trial by jury shall be as heretofore, and the right thereof remains inviolate.

Article I, Section 7:

* * * The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. * * *

Article I, Section 9:

In all criminal prosecutions the accused hath a right to * * * a speedy public trial by an impartial jury of the vicinage; * * * nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.

STATEMENT.

This is an action in equity commenced on November 9, 1959, in which William Goldman Theatres, Inc.[2] and Pennsylvania Association of Amusement Industries requested judgment enjoining the Pennsylvania State Board of Motion Picture Control from enforcing any of the provisions of the Pennsylvania Motion Picture Control Act (hereafter "Act") as approved September 17, 1959.[3] The complaint challenged the Act as violative of the Pennsylvania Constitution (R. 7a, 8a, 9a, 28a) as well as violative of the Fourteenth Amendment (R. 7a, 8a, 9a). The Court of Common Pleas of Dauphin County, en banc, granted plaintiffs' motion for judgment upon the pleadings, and sustained the challenges by plaintiffs based upon the Pennsylvania Constitution, as well as based upon the Fourteenth Amendment. The Supreme Court of Pennsylvania affirmed the judgment of the Court of Common Pleas of Dauphin County. Speaking for a majority of the Pennsylvania Supreme Court Chief Justice Jones held (Pet. App. 51-52):

> Since the Motion Picture Control Act of 1959 plainly violates both our State and Federal Constitutions in the particulars hereinabove pointed out, it follows that the decrees of the court below adjudging the Act unconstitutional and void must be affirmed.

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2. William Goldman Theatres, Inc. is engaged in operating motion picture theatres in Pennsylvania. Pennsylvania Association of Amusement Industries is an unincorporated association which includes operators of motion picture theatres in Pennsylvania.

3. After the commencement of the present Action Twentieth Century-Fox Film Corporation, on November 30, 1959, filed a taxpayers bill in the Court of Common Pleas of Dauphin County to restrain the Superintendent of Public Instruction, the Auditor General and the State Treasurer of the Commonwealth of Pennsylvania from expending any funds from the State Treasury for the enforcement of the Act.

The opinion of the Pennsylvania Supreme Court contains clearly articulated holdings that the Act violates Pennsylvania Constitutional standards (Article I, Section 7 — "Apart from the Fourteenth Amendment * * *", Pet. App. 34, 39; Article I, Sections 6 and 9, Pet. App. 40, 43). In distinguishing a decision of this Court the Pennsylvania Supreme Court said:

> * * * That case in no way involved the rights guaranteed the individual by the Pennsylvania Constitution. (Pet. App. 43)

ARGUMENT.

1. Petitioner concedes that "The opinion of the Pennsylvania Supreme Court holding the Motion Picture Control Act of 1959 unconstitutional rests upon both Federal and State grounds" (Pet. 17). If so, then this Court is without jurisdiction. "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest upon adequate and independent state grounds", **Herb v. Pitcairn**, 324 U. S. 117, 125 (1945).[4]

2. Petitioner makes no claim that the non-federal ground asserted by the Pennsylvania Supreme Court alternatively as the basis for its decision is not adequate; petitioner claims only that the non-federal ground is not independent (Pet. 17, 21). This claim is without merit.

3. The Pennsylvania Supreme Court has clearly decided the invalidity of the Act under the Pennsylvania constitution. Even were its decision not clear (which it is) this Court would lack jurisdiction. "Jurisdiction of this Court cannot be founded upon surmise", **Lynch v. New York ex rel. Pierson**, 293 U. S. 52, 54 (1934); were it not clear that the Pennsylvania Court had decided the Act's invalidity alternatively upon the non-federal ground, there would still be no jurisdiction in this Court.

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4. This Court pointed out further that "We are not permitted to render an advisory opinion and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion", 324 U. S. at 126. The non-federal ground rule, of course, stems from the historic case of **Murdock v. Memphis**, 20 Wall. 590, 636 (1847). See Weisberg, **Supreme Court Review of State Court Decisions Involving Multiple Questions**, 95 U. of Pa. L. Rev. 164 (1947). The rule has been described as a "vital" limitation on this Court's jurisdiction and as not a "mere bit of red tape", **Irwin v. Dowd**, 359 U. S. 394, 408 (1959) (Frankfurter, J., dissenting).

4. The Pennsylvania Court's holding of the Act as violative of Article I, Section 7 of the Pennsylvania Constitution does not refer to federal decisions even as persuasive authority, and clearly it is independent of any possible federal ground. **Fox Film Corporation v. Muller**, 296 U. S. 207, 211 (1935). A decision of the federal question by the Pennsylvania Court was unnecessary and, whether decided or not, this Court's "want of jurisdiction is clear". **Ibid.** Had the Pennsylvania Court employed the decisions under the federal constitution merely as persuasive authority for its independent interpretation of the state constitution this Court would have no jurisdiction for review. **State Tax Commission v. Van Cott**, 306 U. S. 511 (1939); **Minnesota v. National Tea Co.**, 309 U. S. 551, 555 (1940). And even were the Pennsylvania Supreme Court's opinion considered as ambiguous (which it is not) this Court would choose the interpretation thereof "which does not face us with a constitutional question". **Black v. Cutter Laboratories**, 351 U. S. 292, 299-300 (1956).

5. The present case involves a state court's decision which rests upon two grounds, state and federal. An argument is not possible in the present case that the Pennsylvania Court's holding that the Act is violative of the Fourteenth Amendment constituted a total abandonment of the state ground and a legal erasing of its holding under the Pennsylvania Constitution. Compare **Irvin v. Dowd**, 359 U. S. 394, 410.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be denied.

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